

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. :	2130 of 2018
Date of filing complaint:	29.07.2019
First date of hearing:	30.04.2019
Date of decision :	31.08.2022

Sh. Pramod Kumar Arora R/O: 3rd Floor 286a Patparganj Mayur Vihar Phase-1 Delhi -91	Complainant
Versus	
M/S Imperia Structures Limited Regd. Office: A-25 Mohan Co Operative Industrial Estate New Delhi 110044	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
None	Complainant
Sh. Himanshu Singh (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the

provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"Mindspace" at sector 62, Golf Course Road, Gurgaon, Haryana
2.	Project area	IT Park Colony
3.	Nature of the project	8.35625 acres
4.	DTCP license no. and validity status	86 of 2010 dated 23.10.2010 valid upto 22.10.2020
5.	Name of licensee	Baakir Real Estate Pvt. Ltd. and others
6.	RERA Registered/ not registered	240 of 2017 dated 25.09.2017 valid upto 31.12.2020
7.	Date of application for booking	04.10.2011 (Page 11 of reply)
8.	Unit no.	A7th Floor 011 (Page 18 of the Complaint)
9.	Unit area admeasuring	250 sq. ft. (super area) (Page 15 of the Complaint)
10.	Date of execution of Apartment Buyer's Agreement	Not on record
11.	Possession clause	Not on record
12.	Due date of possession	04.10.2014 (Calculated as 3 years from date of signing of application form for booking in view of the Supreme Court judgment on the subject)
13.	Total sale consideration	Rs. 15,00,000/- (BSP) (Page 22 of annexure R-2 at page 22 of reply)
14.	Amount paid by the complainants	Rs. 3,07,725/- (As alleged by complainant on page 7 of complaint)

15.	Demand/Reminder Letters	08.12.2015,29.12.2015, 03.08.2016, 07.11.2016, 28.06.2017
16.	Surrender Letter	17.07.2017 (Page 18 of reply)
17.	Cancellation Letter	09.05.2018 (Page 40 of reply at annexure R-10)
18.	Occupation certificate /Completion certificate	The counsel for respondent during proceedings dated 31.08.2022 stated that the occupation certificate for the concerned unit has been obtained on 02.06.2020
19.	Offer of Possession	Not offered

B. Facts of the complaint:

3. That the Complainant believed on the assurances given by the Respondent for the investment in their project "Imperia Byron" and the complainant believed upon their assurance then became ready to invest in said project.
4. That on 05.10.2011, the complainant paid a sum of Rs. 1,50,000/- by cheque No.744996 as booking amount under construction linked payment plan against the receipt no. 0290 dated 20.10.2011 dated for tower No. A, 7th floor 011, tentatively admeasuring area of 250 sq. ft./ 23.23 sq. mtr. in their commercial project "Imperia Byron" at sector-62, Golf Course Extn. Road, Gurgaon, Haryana. That the respondent had assured at the time of booking of the said unit that the possession of the booked unit shall definitely be handed over within a period of 36 months from the date of booking. The total sale consideration was agreed Rs. 16,72,500/- (Sixteen Lakh Seventy Thousand Five Hundred Only).

5. That on 01.12.2011, as per demand by the respondent, the complainant paid an amount of Rs. 1,57,725/- (including service tax Rs.7,725/-) by cheque no.740602 in favour of the respondent.
6. That the complainant received a reminder/letter dated 29.12.2015 sent by the respondent stating that the outstanding amount of Rs. 1,56,524/- was due on 21.12.2015 as per the payment plan. The respondent also requested to deposit the said amount along with interest within 10 days of issue of this letter.
7. That the complainant received a letter dated 15.03.2016 from the Respondent wherein it was mentioned that the company/developer M/s Imperia Structures Ltd. has changed the name of the project "Byron" and has renamed the project to "Mindspace". The said changes were never communicated with the complainant before this letter.
8. After receiving the letter dated 15.03.2016, the complainant visited the booking site and office of the respondent and reminded them that he had already paid all dues as per demand/payments plan. The complainant also asked the respondent for the status of the project but to no avail.
9. That the complainant received a reminder letter dated 03.08.2016 sent by the respondent stating that the outstanding amount of Rs. 1,36,749/- was due on 12.08.2016 as per the payment plan. The respondent also requested to deposit the said amount along with interest within 10 days of issue of this letter. The respondent also issued a demand letter dated 07/11/2016 to the complainant for due payment on casting of 2nd

basement floor slab and requested to deposit within 15 days of issue of his letter.

10. That on 17.03.2017, the complainant wrote a mail to the respondent reminding that he had already paid all dues as per demand and that the project is too late to hand over its possession. The complainant also wrote that there is no movement on the booking project and have been following about the same since the day of booking but nothing happened and the complainant will not be keen to continue with the same as till date March 2017, the possession has not been handed over. The complainant also requested to the respondent to refund the paid money with interest.
11. That in persuasion of mail/correspondent/telephonic by the complainant with the respondent, the respondent sent the demand letter dated 28.06.2017 for payment due on casting of ground floor slab despite e-mail dated 17.03.2017 which caused not only the mental shock to the complainant but became evident that the respondent is malafidely trying to cheat the complainant as the respondent is not refunding the paid amount along with interest.
12. That, in addition to the e-mail dated 17.03.2017, the complainant also gave a letter dated 24.07.2017 to the respondent for cancellation of booking the said unit and refunding the paid amount and the same was received by official of the respondent.

13. That the complainant made repeated requests, telephonically and physically regarding the refunding the paid amount but the respondent did not bother to refund the same.
14. That the complainant received a cancellation letter dated 09.05.2018 wherein it was stated that in spite of several reminders, the complainant has not paid the dues in respect of the commercial unit and the respondent cancelled the booking unit. It was also mentioned that the respondent is entitled to forfeit the 15% of the basic sales price along with the brokerage amount paid by the complainant against the said unit.
15. That the complainant made several efforts to recover the aforesaid amounts from the respondent and when all the endeavours of the complainant failed to bring around the respondent to clear the dues, the complainant sent a legal notice dated 20.09.2018 calling upon the respondent to refund the deposited amount along with interest w.e.f. 05.10.2011 till the same is paid in full and final to the complainant within 15 days from the receipt of the said notice, but the respondent has not refunded any payment to the complainant.
16. That it is clearly indicative that the respondent was trying to avoid and cheat the complainant unduly and unjustly by neither giving the possession of the booked unit as per the assurance nor refunding the amount thereby resulting in unlawful gain to yourself and unlawful loss to the complainant. The complainant, due to all these reasons, is left with no option but to approach this Authority for refund of its paid up amount.

C. Relief sought by the complainant:

17. The complainant has sought following relief(s):

- i. Direct the respondent to pay to the complainants an amount of Rs. 3,07,725/- with interest calculated from the date of deposit till the date of actual realization,
- ii. Direct the respondent to award cost of litigation of Rs. 60,000/- in favour of the complainants and against the respondents.

D. Reply by respondent:

18. The respondent through their reply has submitted that the present complaint, filed by the complainant, is absolutely frivolous, misconceived, malafide and an abuse of the process of this Hon'ble Authority. That the Complainant has failed to approach this Hon'ble Authority with clean hands lacks bonafide intents and suppressed material facts and is as such guilty of *suppressio veri* and *suggestio falsi*.

19. It was submitted that the complainant was an investor who has made investment in the esteemed project namely "Mindspace" located at Sector 62 Gurgaon Haryana. Accordingly, the complainant was allotted an office space admeasuring 250 sq. ft. on the seventh floor of the project "Mindspace". It would be pertinent to mention here that the due to the sudden fall in the real estate market, the complainant is willing to withdraw himself from the said project.

20. The complainant had opted for construction linked payment plan and had till date paid an amount only of Rs.3,07,725/-against the said studio

apartment out of total sale consideration i.e. 16,72,500/- excluding taxes and an amount of Rs. 13,64,775/- is due on the complainant.

21. That despite being fully aware of the status of the project and the reasons for delay that being beyond the control of the respondent, the complainant herein filed the present complaint and the same is based on absolutely concocted and misconceived statements.
22. That it was submitted that the construction at the site is being done in phases and is going in full swing. It was further humbly submitted that any delay in delivering the possession to the complainant cannot be attributed upon the respondent due to force majeure events, which were beyond the control of the respondent. It was further submitted that the said project is almost completed and only finishing work is left for handing over possession of the said unit.
23. It was also submitted that "Force majeure" is governed by the Indian Contract Act, 1872. The Hon'ble Supreme Court of India held that in so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. Thus, the present complaint is a subject matter of trial and hence the Hon'ble Authority does not have the requisite jurisdiction to adjudicate upon the said dispute and as such the present complaint is not maintainable.

24. That it was humbly submitted that the complainant and the respondent are bound by the terms and conditions of the application form and therefore the dispute if any falls within the ambit of a civil dispute and all other allegations levelled by the complainant are false and baseless.
25. That the respondent cannot be held liable for any cost or damages/interest due to delay in obtaining regulatory compliances from various authorities and for any default on the part of the complainants themselves.
26. It was submitted that the respondent has already invested the entire sum of money received by the respondent towards the said unit in the construction of the said project. Therefore, is not in the position to refund the same to the complainant.

E. Jurisdiction of the authority:

27. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

28. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the Town and Country Planning Department, the jurisdiction of the Real Estate Regulatory Authority, Gurugram shall be the entire Gurugram District for all purposes with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of

Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

29. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

30. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Entitlement of the complainant for refund:

F.I To direct the respondent to refund the total amount deposited by the complainant along with interest at the prescribed rate from the date of deposit to the date of actual payment.

31. The complainant submitted that he booked a flat in the project named as Mindspace by submitting an application form dated 04.10.2011. The

complainant was subsequently allotted a unit in the project. The same has been concluded from the fact that the respondent issued demand letters to the complainant for the concerned unit. It is also important to mention that no BBA has been executed between the parties. The complainant vide email dated 17.07.2017 surrendered the unit. Meanwhile, the respondent also cancelled the unit of the complainant vide letter dated 09.05.2018. The due date of possession cannot be ascertained due to lack of documents. However, the Hon'ble Supreme Court in the case of *Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018* wherein it was observed as under:

"a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract".

32. In view of the judgment cited above, the date of signing of the application form ought to be taken as the date for calculating the due date of possession. Therefore, the due date of handing over of the possession of the unit comes out to be 04.10.2014. Hence, the complainant surrendered the unit after the due date of possession which means he is entitled for refund under section 18(1) of the Act of 2016.
33. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the

promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

34. The due date of possession as per the position of law discussed above is 04.10.2014 and there is delay of almost 5 years on the date of filing of the complaint.
35. The complainant has paid only a sum of Rs. 3,07,725/- out of a basic sale consideration of Rs. 15,00,000/- i.e., merely 20% of basic sale price. The respondent had the right to send reminders to the complainant to clear its dues and, in case the same was still not paid, to cancel the unit on account of non-payment. However, the respondent chose not to cancel the unit. In the meantime, the due date of possession had expired. Hence, the respondent is liable, on demand of the complainant-allottee, to refund the amount deposited by him under section 18(1) along with interest at the prescribed rate.
36. Further, in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)* reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020* decided on 12.05.2022 and observed that:

The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the

Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

37. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
38. This is without prejudice to any other remedy available to the allottee including compensation for which the allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
39. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 3,07,725/- with interest at the rate of 10.00% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 (ibid).

F.II To direct respondent to pay Rs. 60,000/- as litigation expenses.

40. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021)*, has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

41. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 3,07,725/- with interest at the rate of 10.00% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 (ibid).

- ii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.

42. Complaint stands disposed of.

43. File be consigned to the registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.08.2022